MOTION FILED
APR 1983

Office-Supreme Court, U.S.
FILED
APR 25 1983
ALEXANDER L. STEVAS,

No. 82-1579

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor,

v.

CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

~~MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* AND TO FILE A~~ BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT ON BEHALF OF THE STATE OF WISCONSIN AND PROPOSED BRIEF

BRONSON C. LA FOLLETTE
Attorney General

CHARLES D. HOORNSTRA
Assistant Attorney General

Attorneys for the State of Wisconsin

Post Office Box 7857
Madison, Wisconsin 53707
(608) 266-9945

No. 82-1579

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor,

v.

CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* AND TO FILE A BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT ON BEHALF OF THE STATE OF WISCONSIN

BRONSON C. LA FOLLETTE
Attorney General

CHARLES D. HOORNSTRA
Assistant Attorney General

Attorneys for the State of Wisconsin

Post Office Box 7857
Madison, Wisconsin 53707
(608) 266-9945

No. 82-1579

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor,

v.

CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* AND TO FILE A BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT ON BEHALF OF THE STATE OF WISCONSIN

The State of Wisconsin, by its Attorney General, moves this Court for leave to appear as an *amicus curiae* and to

file the attached brief in support of the jurisdictional statement and to appear in an *amicus* capacity throughout the proceedings in the Court.

BRONSON C. LA FOLLETTE
Attorney General

CHARLES D. HOORNSTRA
Assistant Attorney General

Attorneys for the State of Wisconsin

Post Office Box 7857
Madison, Wisconsin 53707
(608) 266-9945

No. 82-1579

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor,

v.

CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PROPOSED BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT ON BEHALF OF STATE OF WISCONSIN

BRONSON C. LA FOLLETTE
Attorney General

CHARLES D. HOORNSTRA
Assistant Attorney General

Attorneys for the State of Wisconsin

Post Office Box 7857
Madison, Wisconsin 53707

(608) 266-9945

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

ARGUMENT 2

The Question is Substantial 2

A. A sensitive federalism issue is presented 2

B. Essential attributes of state sovereignty are at stake 2

C. The federal and state programs are in harmony 3

D. The decision frustrates federal interests 6

E. The decision has absurd consequences 6

F. Only parochial interests are served by the decision 7

SUMMARY OF ARGUMENT 7

CONCLUSION 8

CITATIONS

UNITED STATES CODE:

49 U.S.C. sec. 10905 4,5,6,7

49 U.S.C. sec. 10905(f) (2) 5

FEDERAL REPORTS:

H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980) 5

WISCONSIN STATUTE:

Sec. 85.09(2) 3

Page

CASES:

Chicago and North Western Transp. Co. v. U.S., 678 F.2d 665 (7th Cir. 1982) 5,6

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) 3

Simmons v. I.C.C., 697 F.2d 326 (D.C. Cir. 1982) 3,4,6

United Transportation Union v. Long Island Railroad Company, 458 U.S. 678 (1982) 2

MISCELLANEOUS:

Nichols, *The Law of Eminent Domain*, sec. 1.141[3] (3d ed. 1981) 2

Opinion of ICC General Counsel 6

No. 82-1579

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor,

v.

CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PROPOSED BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT ON BEHALF OF THE STATE OF WISCONSIN

INTEREST OF THE *AMICUS CURIAE*

The State of Wisconsin has two distinct but overlapping interests.

First, as a sovereign state it has an interest in preserving the right of eminent domain as an essential attribute of its sovereignty.

Second, as a state committed to the restoration of rail service on lines abandoned under the authority of the federal government, the Court of Appeals' decision presents a serious setback. Wisconsin can acquire only abandoned rail property, by reason of state law. The Court of Appeals forecloses all states from acquiring abandoned property by eminent domain. Thus, an essential tool for providing necessary services is frustrated.

ARGUMENT

The Question Is Substantial

A. A sensitive federalism issue is presented

On its face, ousting states of their eminent domain sovereignty is a matter of the highest importance in federal-state relations.

The Solicitor General describes this case as "involv[ing] delicate questions of federalism." (A. 30.) The ICC General Counsel describes it as involving a "significant Tenth Amendment issue because [the holding below] interferes with the State's choice of purposes for which it authorizes use of an integral governmental function — the power of eminent domain." (A. 59.)

B. Essential attributes of state sovereignty are at stake

Running a railroad is not an essential attribute of state sovereignty. *United Transportation Union v. Long Island Railroad Company*, 458 U.S. 678 (1982). Implementing a public purpose through eminent domain is. Nichols, *The Law of Eminent Domain*, sec. 1.141[3] (3d ed. 1981).

The Court of Appeals evidently would permit condemnation of abandoned rail property for recreational or scenic purposes, or to build a highway. Its foreclosure of eminent domain to preserve intrastate rail service is an unprincipled distinction that invades the prerogatives of a sovereign state to choose. As will be seen, it frustrates federal interests as well.

The holding creates a void in the Republic. The federal government has permitted abandonment of rail service in a small part of Minnesota at the behest of a private entrepreneur who cannot make a financial go of it. The Eighth Circuit now concludes that states are impotent to meet the local rail need *in futuro* because of federal abandonment. Wisconsin's local rail preservation program would be devastated under this ruling, because Wisconsin can acquire only abandoned rail property. Sec. 85.09(2), Wis. Stats. (A. 66.)

C. The federal and state programs are in harmony

The Court of Appeals made three errors in analysis: (1) it neglected to attempt to harmonize state and federal law; (2) it failed to appreciate that Congress encourages local programs like Minnesota's to revive rail service in the wake of the hemorrhaging abandonments throughout the interstate rail corridors; and (3) it saw state-federal conflicts where none exist because it did not discern the complementary nature of the two programs.

One can agree with the court, at least *arguendo*, that a state rail preservation program must not stand as an obstacle to the federal program. But one still can insist on the court's duty to attempt to find harmony between the two programs. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973).

The laws are in harmony. Congress has fostered state restoration of local service to replace federally abandoned rail lines. The "collapse of several major carriers necessitated a substantial federal effort to ensure continuation of vital service." *Simmons v. I.C.C.*, 697 F.2d 326, 328 (D.C. Cir. 1982). This effort included "encouraging states to become involved in the preservation of local rail service." *Id.* Through subsidies and other means, the "congressional policy . . . plac[es] the states at the forefront of the federal effort to preserve local rail service." *Id.* at 329. Because of state involvement after abandonment, the ICC acknowl-

edged "it lacked jurisdiction to regulate state acquisition of an abandoned rail line, since by the process of abandonment the line lost its status as rail property." *Id.* at 331.

Although federal jurisdiction is lacking as to state acquisition of an abandoned line, Commission jurisdiction awakens once operation of the line resumes. *Id.* But states were exempted from many of the ICC start-up rules in order to "remove obstacles that might prevent state acquisition of abandoned rail lines." *Id.* at 332.

Thus, federal policy is served only by encouraging state acquisitions of abandoned rail property. The court's failure to understand this is its basic flaw.

Title 49 U.S.C. sec. 10905 concerns the process of abandonment, not subsequent acquisition. It only "postpone[s]" the abandonment date on receipt of an offer of financial assistance. It is a tool to avoid abandonment, not a solution after abandonment. Whatever state powers may be preempted prior to abandonment, the ICC General Counsel agrees that "once a rail line has been abandoned, section 10905 can no longer be viewed as preempting a state law condemnation." (A. 45.) For the subsequent state action "would not alter the carrier's status as a common carrier." (A. 49.) Indeed, the ICC has not participated in this case because the outcome will not affect the Commission's "exercise of its power to regulate the abandonment of service, including the provisions of section 10905." (A. 59.) The federal interest ceases upon abandonment "because the line has been found not to be required in interstate commerce." *Id.*

The Eighth Circuit did not appreciate the cooperative federalism erected by Congress: the ICC controls the abandonment process; the states are encouraged to then take over to revive local rail service.

Lacking this perception of the overall federal scheme, the Court of Appeals saw conflicts where none exist.

The court saw a conflict from delay caused by eminent domain proceedings. But post-abandonment condemnation does not delay the abandonment. Congress shortened the ICC abandonment process from six months to about 110 days for two reasons. One purpose was to protect carriers from efforts to "tediously extend the abandonment process." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980). The ICC General Counsel notes this quote refers to the previous six months at the ICC, not a subsequent state condemnation. (A. 61.) State condemnation, of course, does not extend abandonment proceedings; it operates only after completion of abandonment.

Congress' second purpose in abbreviating the six months was to protect states from carrier gouging. The six-month period "enabled a railroad to hold out for a price that would reflect at least some of the value of continued rail service." *Chicago and North Western Transp. Co. v. U.S.*, 678 F.2d 665, 667 (7th Cir. 1982). Congress did not want this power in railroads, and "[t]hat is why it amended section 10905 in 1980 to allow — indeed require — the Commission to fix the price of the sale if the parties could not agree." *Id.* at 668. The purpose of protecting states is not frustrated by allowing condemnation.

The court also saw a conflict in using condemnation as a price setting mechanism after invocation of the price setting mechanism in sec. 10905. First, however, this "conflict" at best would foreclose the 10905 offeror from using state condemnation, perhaps on a waiver theory. It hardly warrants the court's sweeping conclusion that the mere existence of sec. 10905 jettisons any post-abandonment condemnation, regardless of whether 10905 is invoked or whether the condemnor and 10905 offeror are one and the same. Second, sec. 10905 expressly empowers the offeror to walk away from the ICC price; only the carrier is bound. 49 U.S.C. sec. 10905(f) (2). Since Congress expressly refrained from binding the offeror, the court should not do so even on a waiver theory, much less under the guise of

a preemption analysis. Third, the purpose in binding the carrier was not to save it from condemnation or to terminate acquisition efforts, but was to exact a *quid pro quo* for the accelerated process. As accelerated, the carrier can reduce the losses on an unprofitable line, but it is bound by the price. *See Chicago*, 678 F.2d at 671. While the offeror can yet choose condemnation, it must suffer the lost service in the interim. Fourth, different valuation factors arise in a condemnation that may make the price lower or higher. *See* Opinion of ICC General Counsel. (A. 46, esp. n. 3.)

Finally, the court saw a conflict from state law because of the detailed procedure in 10905. However, as the ICC Office of Proceedings noted, 10905 sets forth "an extensive statutory plan for such sales *before* abandonment becomes effective, but there is nothing in the statute to suggest a federal interest in the property once abandonment is consummated." (A. 55.) (Emphasis in original.)

D. The decision frustrates federal interests

By foreclosing state eminent domain acquisitions of abandoned rail property, the Eighth Circuit frustrates the congressional policy to place the states at the forefront of restoring service in this depression-plagued industry.

The ICC General Counsel has noted the federal funding programs designed to instigate state activity. (Juris. Statement at 15.) *Also see Simmons*, 697 F.2d at 328-29. The Eighth Circuit stymies use of the funds. Apart from use of federal funds, the decision has "foreclosed one important means by which states may help to continue rail service," ICC General Counsel. (A. 59.)

E. The decision has absurd consequences

Since abandoned railroads often lie fallow for months or years, *see* A. 57, the Eighth Circuit decision means the states could not condemn even after that dormancy. Moreover, since preemption is a jurisdictional matter, a state could not condemn even if the carrier agreed such procedure

was the best price-setting mechanism. Indeed, even with a dozen intervening private owners, 10905 so runs with the land, under the ruling even into the twenty-first century, that the state could not condemn for rail purposes — ever.

Further, if abandonment under 10905 preempts state law afterwards, how can the railroad sell the property if not pursuant to state law? If the federal interest continues, how can it be sold even if state recording laws, etc., otherwise apply? What federal interest survives? Is it assumed only eminent domain is preempted? If so, is it because a state judicial system cannot be trusted to ascertain just compensation? It is the ICC, however, and not state courts, that lacks valuation experience.

F. Only parochial interests are served by the decision

This decision serves no federal regulatory interest, as witnessed by the ICC's declination to worry about it. It jeopardizes state prerogatives, as witnessed by the active involvement of the neighboring states. It serves no interest of the Association of American Railroads. (Juris. Statement at 11.)

This decision serves only the parochial interests of a single carrier that apparently wishes to remove the track, thereby obstructing the state and federal interest to restore service.

SUMMARY OF ARGUMENT

This case presents a substantial federal question.

The decision below declares that Congress has preempted the state power of eminent domain. Eminent domain, however, is an essential attribute of state sovereignty which can be preempted, if at all, only under the clearest of conflict with federal law.

No such conflict appears here. In fact, the programs are in harmony. The federal interest lies in controlling the con-

ditions under which a rail carrier may abandon service. Once that service is abandoned, no federal regulatory interest in the rail line survives. It is federal policy, however, to encourage states to fill the void by developing programs to restore local rail service.

The decision below denies the use of eminent domain to pursue the federal policy of restoring local rail service through state programs. In so doing, the court has both frustrated federal policy and invaded an essential attribute of state sovereignty.

CONCLUSION

It is respectfully submitted that this court should note its jurisdiction and set the case for plenary consideration.

Respectfully Submitted,

BRONSON C. LA FOLLETTE
Attorney General

CHARLES D. HOORNSTRA
Assistant Attorney General

Attorneys for the State of Wisconsin

Post Office Box 7857
Madison, Wisconsin 53707
(608) 266-9945
April 22, 1983